

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of the Title V Air Quality Operating Permit	}	
	}	
Issued to Danskammer Energy, LLC, for the Operation of the Danskammer Generating Station	}	Permit No. 3-3346-00011/00017
	}	DEC Facility ID No. 3334600011
	}	
	}	Petition to Object to Title V Air Quality Operating Permit
	}	
By the New York State Department of Environmental Conservation	}	

INTRODUCTION

Pursuant to Section 505[b][2] of the Clean Air Act (42 U.S.C. § 7611d[b][2]) and 40 C.F.R. § 70.8[d], Riverkeeper, Inc. (“Petitioner”), by and through its undersigned attorneys, respectfully and hereby petitions the Administrator of the Environmental Protection Agency (“EPA”) to object to a Title V permit issued by the New York State Department of Environmental Conservation (“NYSDEC”) for the Danskammer Generating Station (the “Station”), which is located in a non-attainment area for ozone¹ in Newburgh (Orange County), New York.

NYSDEC Title V Permit No. 3-346-00011/00017 authorizes the operation of the Station, which is a reactivated major source of air pollution within the meaning of EPA’s Reactivation

¹ See NYSDEC August 18, 2014 Title V Permit Review Report, a true and complete copy of which is attached hereto as **Exhibit A**, at 2 of 22. See also 40 C.F.R. § 81.333. At all times pertinent herein, the regulatory status of Dutchess, Orange, and Putnam counties has remained in non-attainment for ozone which is detrimental to human health and well-being and is a known causal agent for mortality and morbidity (see, e.g., EPA, Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Final Rule, 69 Fed. Reg. 23858 [April 30, 2004]; see also NYSDEC August 18, 2014 Draft Title V Operating Permit, a true and complete copy of which is attached hereto as **Exhibit B**).

Policy (*see Cmtys. for a Better Environment v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1146 [C.D. Cal. 2001], *quoting* US EPA, *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc., Proposed Operating Permit*, Petition No. 6-99-2 [June 11, 1999], at 9-1; *see also United States v Duke Energy Corp.*, 981 F. Supp. 2d 435, 438 n.1 [M.D.N.C. 2013]).

As the New York State Office of the Attorney General has elsewhere explained, the Station “was constructed before the passage of the 1970 federal Clean Air Act”, was thus “grandfathered from various pollution control requirements that apply to newer power plants, such as New Source Review”,² and consequently “lacks modern pollution controls that substantially reduce the emission of air pollutants that harm public health and the environment”.³

As is explained below, in order to comply with the Clean Air Act, the reactivation of the Station would require: (1) a pollution control technology assessment, which, in attainment areas is a Best Available Control Technology (BACT) assessment (42 U.S.C. §§ 7475, 7479[2][C]); (2) a pollution control technology assessment, which, in non-attainment areas involves a Lowest Achievable Emission Rate (LAER) assessment (6 NYCRR § 231-5.4), and; (3) air emission offsets if in a non-attainment area (6 NYCRR § 231-5.5).

² New York State Office of the Attorney General, Motion to Intervene and for Discovery, and Comments Pursuant to April 23, 2014 Notice of Petition, Joint Application of Helios Power Capital, LLC, Danskammer Energy, LLC, and Mercuria Energy America, Inc., PSC Case No. 14-E-0117 (June 9, 2014), a true and complete copy of which is attached hereto as **Exhibit C**, at 3, ¶ 6. It should be noted by the Administrator that the New York State Office of the Attorney General’s Motion to Intervene explained as follows:

At this juncture, the Office of the Attorney General does not take a position about the final outcome of the Joint Application and this proceeding. In its current form, the Joint Application does not provide information about important issues raised by the applicants’ request to rebuild and operate Danskammer as an electric generating plant. Accordingly, the Office of the Attorney General respectfully requests that the Commission authorize the office to intervene in the proceeding and to conduct discovery concerning the proposed rebuilding, re-starting and operation of Danskammer and the transactions proposed in the Joint Application. PSC Case No. 14-E-0117. (*Id.* at 26).

³ *Id.* at 3-4.

PETITIONER

Riverkeeper is a member supported, not-for-profit organization dedicated to protecting and restoring the unique environmental resources of the Hudson River and the Hudson River Valley and to foster proper management of such natural environment and resources. Riverkeeper is accordingly dedicated to ensuring that proposed reactivation of the sixty-plus-year-old Station (a Station which has to date evaded new source review and which has not operated since October 29, 2012) occurs in full conformance with the Clean Air Act, including both prevention of significant deterioration and nonattainment new source review requirements.

THE STATION

The Danskammer Generating Station (the “Station”) is located on the western shore of the Hudson River, in the Town of Newburgh, Orange County, New York, approximately 66 river miles north of New York City. The total maximum net generating capacity of the Station’s four steam turbines (Units 1-4) is 491 megawatts.⁴ The deactivated Station consists of four fossil-fueled generating units. Units 1 and 2 can burn natural gas and oil, and began their respective commercial operations in 1951 and 1954.⁵ Units 3 and 4 burn natural gas, and began their respective commercial operations in 1959 and 1967.⁶ NYSDEC’s draft Title V Permit and related analyses considered the Station as of August 14, 2014 as an “existing” source of air pollution, for which the Title V permit was being “modified”⁷:

⁴ NYSDEC Danskammer Generating Station Biological Fact Sheet, a true and complete copy of which is attached hereto as **Exhibit D** at [1].

⁵ August 20, 2014 NYSDEC Environmental Notice Bulletin Combined Notice, a true and complete copy of which is attached hereto as **Exhibit E**, at [1]-[2].

⁶ August 20, 2014 ENB Combined Notice, **Exhibit E** hereto, at [1]-[2]).

⁷ NYSDEC August 20, 2014 State Environmental Quality Review Act Negative Declaration Attachment, a true and complete copy of which is attached hereto as **Exhibit F**, at [1].

The Department is proposing to modify the Title V air permit for Danskammer pursuant to 201-6.6. The primary modification to the permit is to eliminate the ability of the facility to burn coal in units 3 and 4. This modification was at the request of the facility. The modified permit also updates the NOx RACT plan for the facility. The Title IV acid rain permit is modified to reflect the elimination of burning coal. Eliminating the use of coal at the Danskammer facility significantly reduces the potential impacts of the facility on air quality. Therefore, the potential impacts of modifying the Title V and Title IV permits will have a positive impact on the environment.⁸

NYSDEC provides no basis, either as compared to a zero baseline or a baseline premised upon prior operations, for its ambiguous conclusions that the Station “is being operated with the same equipment that existed prior to the storm, but with reduced emissions since it is fueled by natural gas, with coal no longer authorized.”⁹ Nothing in the NYSDEC public record assessed, presented, or even mentioned any calculation with respect to the potential to emit (PTE) comparing coal-fired operations to the modified permit and retrofitted Station. Moreover, NYSDEC declined to provide or discuss the prior permit limits from the prior coal-fired operations as compared to the gas-fired retrofit reactivation in the analyses supporting its decision.

Emissions associated with reactivating the Station simply include predicted potential emissions of greater than or equal to 250 tons per year (but less than 75,000 tons per year) of the following regulated air pollutants: particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides and volatile organic compounds.¹⁰ As noted, the Station is located in a non-attainment

⁸ *Id.* at [1].

⁹ NYSDEC February 24, 2015 Title V Permit Response to Comments, at true and complete copy of which is attached hereto as **Exhibit G**, at 16 [emphasis supplied]; *see also* NYSDEC February 24, 2014 Final Title V Operating Permit for Danskammer Generating Station, a true and complete copy of which is attached hereto as **Exhibit H**.

¹⁰ NYSDEC, Air Pollution Permit Review Report [August 18, 2014], **Exhibit A** hereto, at 6-7 of 22.

area for ozone¹¹ in Newburgh (Orange County), New York, which is also in attainment for particulate matter, sulfur dioxide and carbon monoxide (40 C.F.R. § 40.8133).

PERTINENT FACTUAL REACTIVATION HISTORY

On or about January 3, 2013, Dynegy Danskammer, LLC (“Dynegy Danskammer”) filed a notice (the “Retirement Notice”) with the New York State Public Service Commission (“NYSPSC”) as bankruptcy debtor-in-possession of the Station which expressed an intent to discontinue operating the Station for reasons which included the poor economics of operating the Station and the need for substantial additional investment to safely and reliably maintain and operate the Station as well as to continue to conform to current and future environmental regulations.¹² According to the Retirement Notice, as of January 3, 2013, the Station had been inoperable since October 29, 2012, when the Station was flooded by Superstorm Sandy.¹³ According to the Retirement Notice, repairing the “catastrophic” damage to the Station resulting from Superstorm Sandy would involve substantial costs, as it was estimated that the flooding had damaged approximately 90% of the motors and 60% of the switchgear at the Station.¹⁴ According to the Retirement Notice, Dynegy Danskammer would transfer the Station to a salvage company for a price of 3.5 million dollars in order for the salvage company to dismantle

¹¹ See NYSDEC August 18, 2014 Title V Permit Review Report, **Exhibit A** hereto, at 2 of 22. See also 40 C.F.R. § 81.333. At all times pertinent herein, the regulatory status of Dutchess, Orange, and Putnam counties has remained in non-attainment for ozone which is detrimental to human health and well-being and is a known causal agent for mortality and morbidity (see, e.g., EPA, Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Final Rule, 69 Fed. Reg. 23858 [April 30, 2004]).

¹² January 3, 2013 Notice of Intent to Retire Dynegy Danskammer, L.L.C. Units 1 – 6, a true and complete copy of which is attached hereto as **Exhibit I**, at 2.

¹³ Retirement Notice, **Exhibit I** hereto, at 2.

¹⁴ Retirement Notice, **Exhibit I** hereto, at 2.

the Station.¹⁵

By subsequent Order dated April 22, 2013, the NYSPSC authorized Dynege Danskammer to retire the Station forthwith (NYSPSC, *Order Approving Transfer and Authorizing A Retirement Prior to the Expiration of the Notice Period*, Case 13-E-0012 - Dynege Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief [April 22, 2013]).¹⁶

By subsequent Order thereafter dated October 28, 2013, the NYSPSC found that the Federal Energy Regulatory Commission (“FERC”) had recently established a new capacity zone in the Hudson Valley region of the wholesale electric market, which would result in price increases to electric customers, and that such price increases would be ameliorated by the continued operation of the Station (*see NYSPSC, Order Modifying Prior Order and Establishing Other Procedures*, Case 13-E-0012 - Dynege Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief [October 28, 2013] at 2-3).¹⁷

On or about April 1, 2014, Danskammer Energy, LLC (“Danskammer Energy”), Helios Power Capital, LLC, and Mercuria (collectively, the “Danskammer Respondents”) petitioned the NYSPSC to authorize Danskammer Energy to repair, retrofit, and operate the Station.¹⁸ The

¹⁵ Retirement Notice, **Exhibit I** hereto, at 1.

¹⁶ A true and complete copy of which is attached hereto as **Exhibit J**.

¹⁷ A true and complete copy of which is attached hereto as **Exhibit K**, at 2-3. The NYSPSC October 28, 2013 Order modified the prior NYSPSC April 22, 2013 Order by re-opening the possibility of returning the Station to operation for the purpose of ameliorating electric customer price increases resulting from FERC’s creation of a new capacity zone (*id.* at 6-7).

¹⁸ April 1, 2014 Verified Joint Application of Helios Power Capital LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. for the Lease, Sale and Operation of Danskammer Generating Facility Under Lightened Regulation and for Related Relief, [“Joint Application”], a true and complete copy of which is attached hereto as **Exhibit L**.

NYSPSC April 23, 2014 New York State Register Notice for the Joint Application of Helios Power Capital LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. for the Lease, Sale and Operation of Danskammer Generating Facility Under Lightened Regulation and for Related Relief (“State Register Notice”)¹⁹ reported that Helios, Danskammer Energy, and Mercuria were “requesting authorization and approval under Public Service Law § 70 regulation for a transaction. . . . for the purpose of returning the Facility to operation in conformance with lightened ratemaking regulation.”²⁰

By Order dated June 27, 2014, the NYSPSC approved the lease, sale and reactivation of the Station (NYSPSC, *Order Approving Transfer and Making Other Findings*, Case 14-E-0117 – Helios Power Capital, LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. - Joint Petition for Expedited Approval for the Lease, Sale and Operation of the Danskammer Generating Facility Under Lightened Regulation and for Related Relief [June 27, 2014] at 38-39; *see also id.* at 41-42 [stating that the consequence of the NYSPSC approval was to authorize Danskammer Energy to “seek to return the Danskammer facility to service”]).²¹

On or about August 20, 2014, NYSDEC issued, *inter alia*, a draft modified Clean Air Act Title V Operating Permit for the Station (the “NYSDEC Draft Title V Permit”).²² By a notice letter dated September 29, 2014, Danskammer Energy advised the New York State Independent System Operator that repairs to the Station were underway and that Danskammer Energy intended to return the Station to operation by the end of 2014.²³ Danskammer Energy invested

¹⁹ A true and complete copy of which is attached hereto as **Exhibit M**.

²⁰ State Register Notice, **Exhibit M** hereto, at 21.

²¹ A true and complete copy of which is attached hereto as **Exhibit N**.

²² Draft Title V Permit, **Exhibit B** hereto.

²³ A true and complete copy of which is attached hereto as **Exhibit O**.

roughly 15 million dollars²⁴ to reactivate the Station, which had just previously been valued at roughly 3.5 million dollars in the context of bankruptcy sale for scrap value.²⁵

On October 6, 2014, Riverkeeper submitted Comments on the NYSDEC Draft Title V Permit (“Riverkeeper’s Title V Permit Comments”),²⁶ which explained that the reactivated Station was subject to Clean Air Act new source review for both nonattainment and prevention of significant deterioration (“PSD”) purposes.²⁷ On or about February 24, 2015, NYSDEC issued the final Title V Air Quality Operating Permit (“Final Permit”) for the Station²⁸, which did not require or provide for nonattainment or PSD new source review, together with NYSDEC’s February 24, 2015 Response to Comments²⁹ which set forth NYSDEC’s rationale for why the Station was not being reactivated for new source review purposes.

BASES FOR EPA OBJECTION

A Title V Operating Permit issued by New York State (or indeed any delegated state) must include, *inter alia*, emissions limitations and standards that assure compliance with all applicable requirements at the time of permit issuance (40 C.F.R. § 70.6[a][1]). EPA’s regulations define “all applicable requirements” to include PSD, and non-attainment NSR requirements (40 C.F.R. §§ 70.1[b]; 70.2; 6 NYCRR § 201-6.4[a][1]; *see also* 6 NYCRR §§ 231-

²⁴ December 19, 2014 Affidavit of Larry She, President of Danskammer Energy LLC, a true and complete copy of which is attached hereto as **Exhibit P**, at ¶ 6.

²⁵ Retirement Notice, **Exhibit I** hereto, at 2.

²⁶ A true and complete copy of Riverkeeper’s October 6, 2014 Comments on the NYSDEC Draft Title V Permit is attached hereto as **Exhibit Q**.

²⁷ Riverkeeper Title V Permit Comments, **Exhibit Q** hereto, at 33-36.

²⁸ NYSDEC Final Permit **Exhibit H** hereto.

²⁹ NYSDEC Response to Comments, **Exhibit G** hereto.

5, 231-5.5[d], 231-12; *see also* 40 C.F.R. §§ 51.165[a][1][vi][A][1], 51.165[b][3][1][a] [NSR triggered by increase in “actual emissions”]; 40 C.F.R. §§ 51.165[a][1][xii][B], 51.165[b][21][ii]). As is set forth more fully herein, the Station’s Final Permit lacks the following applicable requirements:

a. A pollution control technology assessment, which, in attainment areas is a Best Available Control Technology (BACT) assessment, for PM10, PM2.5, CO and SO2 (42 U.S.C. §§ 7475, 7479(2)(C));

b. A pollution control technology assessment, which, in non-attainment areas involves a Lowest Achievable Emission Rate (LAER) assessment, for ozone precursors pollutants NOx and VOCs (6 NYCRR § 231-5.4); and

c. Air pollutant emission offsets in a non-attainment area for NOx and VOCs (6 NYCRR § 231-5.5).

Based on the EPA Reactivation Policy³⁰ and federal reactivation precedent (*see Cmty.s. for a Better Environment v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1146 [C.D. Cal. 2001], quoting US EPA, *In the Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2 [June 11, 1999], at 9-11) the factors by which EPA assesses whether a source has been reactivated include:

- ▶ The amount of time the facility has been out of operation;
- ▶ The reason for the shutdown;
- ▶ Statements by the owner or operator regarding intent;
- ▶ The cost and time required to reactivate the facility; and

³⁰ See September 6, 1978 Memorandum from EPA Direction of Stationary Source Enforcement Edward Reich to Stephen A. Dvorkin, Chief, General Enforcement Branch, EPA Region 2, Re: PSD Requirements.

- The status of permits, and ongoing maintenance and inspections during shutdown (*id.*)

An analysis of the foregoing factors (as detailed below) demonstrates that: (1) the Station was shuttered and left unrepaired following hurricane damage; (2) that thereafter the Station's owner indicated an unambiguous intent to retire the Station for reasons which included economic factors as well as the cost of complying with environmental laws; (3) that the Station has (to date) not in fact operated as an electric generating station since October 29, 2014; (4) that the Station (which had a salvage value of 3.5 million dollars) required 15 million dollars in repairs and retrofits; and (5) that the Station was not even fully operable until November 9, 2014. Consequently, the Station is subject to EPA's Reactivation Policy as a new source for purposes of both PSD and nonattainment new source review.

The Amount of Time the Station Has Been Out of Operation

Based on the record and the sworn statements of the President of Danskammer Energy, there is no basis for NYSDEC to claim that the Station has operated as an electric generating facility at any time from October 29, 2012 through February 24, 2015,³¹ aside from some Dependable Maximum Net Capability tests for each of the four (4) each units.³² Such Dependable Maximum Net Capability tests began in September 2014, and consisted of running a particular unit at its best capacity for a minimum of four hours.³³ Units 1 and 2 were tested in September 2014,³⁴ Unit 3 was tested in December 2014,³⁵ and Unit 4 was tested in November

³¹ See December 19, 2014 Affidavit of Larry She, Danskammer Energy LLC President, **Exhibit P** hereto.

³² *Id.* at ¶ 5.

³³ *Id.*

³⁴ *Id.*

2014.³⁶ The record is devoid of any other evidence of the Station actually operating (i.e., producing energy as opposed to providing capacity) at any point since October 29, 2012, aside from the one time, four-hour-minimum, respective test runs which were conducted for Units 1, 2, 3 and 4.

Consequently, NYSDEC's claims that "the Danskammer facility was repaired, has been operating under its existing SAPA-extended Title V permit and has provided electricity to the grid since September 2014"³⁷ fails to acknowledge the operational reality on the ground at the Station, which has not operated in any manner representative of normal source function for the the last thirty (30) months (and counting). NYSDEC's offers perfunctory conclusion that the Station had "begun operation. . . within the 2-year presumptive period"³⁸ for purposes of the EPA Reactivation Policy is inconsistent with the sworn statements of the Station's owner.

Under the Reactivation Policy and in the light of the facts of this case, EPA must consequently reject NYSDEC's assertion that one-time test runs at each of the Station's four units which were admittedly conducted for test purposes constitutes "operation" of the Station (which was until that time a baseload coal plant) since October 29, 2012. To be sure, for New Source Review purposes, actual emission reductions are calculated as the "decrease in the rate of emissions of an air contaminant from an emission source in tons per year," generally at "an average rate at which the source actually emitted the contaminant during the two years preceding the reduction, and is representative of normal source operation based on actual operating hours, production rates and material input" (6 NYCRR § 231-1.1[b][1] [emphasis supplied]; see 6

³⁵ *Id.*

³⁶ *Id.*

³⁷ NYSDEC February 24, 2015 Response to Comments, **Exhibit G** hereto, at 16.

³⁸ *Id.*

NYCRR §§ 231-5, 231-5.5[d], 231-12; *see also* 40 C.F.R. §§ 51.165[a][1][vi][A][1], 51.165[b][3][1][a] [NSR triggered by increase in “actual emissions”]; 40 C.F.R. §§ 51.165[a][1][xii][B], 51.165[b][21][ii]).

The Reason for the Shutdown

Following storm damage in October of 2012, the Station’s Retirement Notice expressed an intent to permanently retire all generating units and discontinue operation of the Station based upon the financial cost of operating the Station and the need for substantial additional investment to safely and reliably maintain and operate the Station as well as to continue to conform to current and future environmental regulations was too great and as a result the facility could no longer operate profitably.³⁹

Given that there was a clear intention to permanently shut the Station down, it is clear that the action before the NYSDEC clearly implicated the question of whether the reactivation of the Station would require New Source Review (*see Communities for a Better Environment v Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1142-1145 [C.D. Cal. 2001]; *see also United States v Duke Energy Corp.*, 981 F. Supp. 2d 435, 438 n.1 [M.D.N.C. 2013]). The Danskammer Respondents accordingly cannot, for Clean Air Act purposes, “carry the burden of showing continuous intent to reopen and definite plans to restart in the foreseeable future. . .” which is required for a reactivated major air pollution source to avoid New Source Review (*Cmtys. for a Better Environment v. Cenco Ref. Co.*, *supra*, 179 F. Supp. 2d at 1146 [emphasis supplied]).

In order to avoid the Reactivation Policy, an applicant must instead “continuously demonstrate concrete plans to restart the facility sometime in the reasonably foreseeable future.

³⁹ Retirement Notice, **Exhibit I** hereto, at 2.

If they cannot make such a demonstration, it suggests that for at least some period of the shutdown, the shutdown was intended to be permanent” (*Cmtys. for a Better Environment v. Cenco Ref. Co.*, 179 F. Supp. 2d 1128, 1146 [C.D. Cal. 2001], quoting *In the matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition No. 6-99-2, p. 9-11, dated June 11, 1999 [emphasis supplied]).

Based on the undisputed record statements, however, the Applicant as a matter of law cannot carry its burden to demonstrate a continuous intent to reactivate the Station. Whether or not such an intent was “manifested,” as NYSDEC argues, is not only irrelevant but also incorrect. The record amply and indisputably illustrates that the applicant took substantial steps towards actual retirement, including seeking and obtaining a retirement finding from NYSPSC which required reversal before the Applicant could be legally authorized to reactivate the Station⁴⁰ (see NYSPSC June 27, 2014 Order Approving Transfer and Making Other Findings in the *Matter of Helios Power Capital, LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. - Joint Petition for Expedited Approval for the Lease, Sale and Operation of the Danskammer Generating Facility Under Lightened Regulation and for Related Relief* (PSC Case 14-E-0117) at 5-6⁴¹ citing March 28, 2014, NYSPSC Order Adopting Emergency Action on a Permanent Basis and Establishing Further Procedures [NYSPSC Case 13-E-0012]).

As the NYSPSC itself explained in the related retirement proceedings (NYSPSC Case 13-E-0012), a reversal of NYSPSC’s retirement finding would be required in order for the Applicant to operate (rather than demolish or otherwise decommission and disassemble for

⁴⁰ Joint Application, **Exhibit L** hereto, R. at 5, quoting Dynegy Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief [Case 13-E-0012], Order Adopting Emergency Action on a Permanent Basis and Establishing Further Procedures [NYSPSC March 28, 2014], at 23 [emphasis supplied]; see also State Register Notice, **Exhibit M** hereto, at 2.

⁴¹ **Exhibit N** hereto.

salvage) the Station (*Dynegy Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief* [Case 13-E-0012], Order Readopting Emergency Action and Establishing Further Procedures [NYSPSC January 22, 2014], 2014 N.Y. PUC LEXIS 11, *9-10).

Accordingly, even if EPA were to follow NYSDEC's lead and in contravention of EPA's Reactivation Policy and federal court precedent relieve Applicants from the burden of demonstrating a continuous intent to operate the Station, the facts of this case illustrate that the Applicant indisputably "manifested" an intent to retire the Station. EPA's Reactivation Policy does not require the consummation of an applicant's intent to retire a facility. Here, the Applicant simply decided, based upon FERC's creation of a new capacity zone, to never take the final step by notifying NYSPSC that the Station had in fact been retired.

Consequently, the Applicant has unambiguously manifested both its intent and its purely economic and regulatory motives with respect to both shutting down and then seeking to reactivate the Station. In any event, the Applicant's manifest inability to demonstrate a continuous intent to reopen and definite plans to restart in the foreseeable future belies NYSDEC's arguments to the contrary (*Cmtys. for a Better Environment v. Cenco Ref. Co.*, *supra*, 179 F. Supp. 2d at 1146).

NYSDEC also claims that the maintenance of the facility on NYSDEC's emissions inventory also weighs against a finding that the shutdown was intended to be permanent.⁴² As the EPA Administrator explained in *Monroe Electric*, "[s]hutdowns of more than two years, or that have resulted in the removal of the source from the State's emissions inventory, are presumed to be permanent" (*In the matter of Monroe Electric Generating Plant Entergy*

⁴² NYSDEC February 24, 2015 Response to Comments, **Exhibit G** hereto, at 16.

Louisiana, Inc., Proposed Operating Permit, Petition No. 6-99-2, [June 11, 1999] at 8 [emphasis supplied]). Based on what NYSDEC has made publicly available, and contrary to NYSDEC's Response to Comments, the Station was, however, removed from the 2013 NYSDEC emissions inventory.⁴³

The Cost and Time Required to Reactivate the Facility

As noted, the Station was assigned a 3.5 million dollar salvage value,⁴⁴ and the Applicant expended roughly four (4) times that amount (15 million dollars) to repair, retrofit and reactivate the Station.⁴⁵ The Station was rendered inoperable by Superstorm Sandy on October 29, 2012. By a notice letter dated September 29, 2014 Danskammer Energy advised the New York State Independent System Operator that repairs to the Station were underway and that Danskammer Energy intended to return the Station to operation by the end of 2014.⁴⁶ The Station was not fully operable until November of 2014,⁴⁷ and has not (aside the one-time test runs for each unit which lasted only a few hours) actually operated from October 29, 2012 to date.

The Status of Permits, and Ongoing Maintenance and Inspections During Shutdown

The Applicant has elsewhere conceded that both operations and supporting maintenance

⁴³ Facility DEC ID number 33346000111 is not contained in the 2013 emission inventory (NYSDEC, 2013 State Air Emission Inventory Summary, available at: <http://www.dec.ny.gov/chemical/99758.html> (last viewed on April 6, 2015), a true and complete copy of which is attached hereto as **Exhibit R**.

⁴⁴ Retirement Notice, **Exhibit I** hereto, at 1.

⁴⁵ December 19, 2014 Affidavit of Larry She, President of Danskammer Energy LLC, **Exhibit P** hereto, at ¶ 6.

⁴⁶ **Exhibit N** hereto.

⁴⁷ December 19, 2014 Affidavit of Larry She, Danskammer Energy LLC President, **Exhibit P** hereto, at ¶ 5.

activity were suspended at the Station.⁴⁸ The Title V Permit for the Station was transferred from the bankruptcy debtor-in-possession (Dynergy Danskammer LLC) to the salvage company (Helios) on or about December 11, 2013.⁴⁹ This Title V Permit transfer occurred roughly one year after Dynergy Danskammer LLC filed the Retirement Notice with the NYSPPSC.⁵⁰ Helios lacked the legal authority to operate the Station at the time of the permit transfer⁵¹ (*see* NYSPPSC June 27, 2014 Order Approving Transfer and Making Other Findings in the *Matter of Helios Power Capital, LLC, Danskammer Energy, LLC and Mercuria Energy America, Inc. - Joint Petition for Expedited Approval for the Lease, Sale and Operation of the Danskammer Generating Facility Under Lightened Regulation and for Related Relief* (PSC Case 14-E-0117)⁵² at 5-6 *citing* March 28, 2014, NYSPPSC Order Adopting Emergency Action on a Permanent Basis and Establishing Further Procedures [NYSPPSC Case 13-E-0012]).

On or about July 25, 2014, a subsequent permit transfer application was sent to NYSDEC to transfer the Title V Permit from the salvage company (Helios) to the current applicant (Danskammer Energy, LLC)⁵³, marking the first time an applicant who was authorized to operate the Station was named in connection with the Title V Permit since the bankruptcy debtor-in-possession filed the January 3, 2013 Retirement Notice. Contrary to the claims contained in the NYSDEC Response to Comments, the status of the Title V Permit simply provides

⁴⁸ December 5, 2014 Affidavit Doug Parce, a true and complete copy of which is attached hereto as **Exhibit S**, at ¶ 13.

⁴⁹ December 5, 2014 Affidavit Doug Parce, **Exhibit S** hereto, at Exhibit A thereto, at [2].

⁵⁰ Retirement Notice, **Exhibit I** hereto, at 2.

⁵¹ Joint Application, **Exhibit L** hereto, R. at 5 *quoting* Dynergy Danskammer LLC - Petition For Waiver of the Generation Facility Retirement Notice Period and Requesting Other Related Relief [Case 13-E-0012], Order Adopting Emergency Action on a Permanent Basis and Establishing Further Procedures [NYSPPSC March 28, 2014], at 23 [emphasis supplied]; *see also* State Register Notice, **Exhibit M** hereto at 2.

⁵² **Exhibit N** hereto.

⁵³ December 5, 2014 Affidavit Doug Parce, **Exhibit S** hereto, at Exhibit B thereto, at [2].

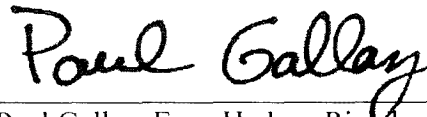
additional confirmation of the stated intent to retire the Station and to transfer the Station to a salvage company, until the creation of the new FERC lower Hudson Valley capacity zone provided Danskammer Energy, LLC with a basis for a different business decision.

CONCLUSION

For all these reasons, the reactivated Station is subject to EPA's Reactivation Policy as a new source for purposes of both PSD and nonattainment New Source Review. EPA should consequently object to the Title V permit issued by NYSDEC for the Danskammer Generating Station.

Dated: April 14, 2015
White Plains, New York

Respectfully submitted,



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